STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
FITZGERALD, P.J., COOPER AND WILDER, J.J.

FREDA ALIBRI,	Supreme Court No. 123091
Plaintiff/Appellant,	Court of Appeals No. 228921
v.	Wayne County Circuit Court Case No. 98-818620 CK
DETROIT WAYNE COUNTY STADIUM AUTHORITY,	
Defendant/Appellee.	

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APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Jurisdiction in this Court is appropriate pursuant to the November 13, 2003 Order of this Court granting Appellant leave to appeal. Appellant seeks review of the December 27, 2002 decision of the Court of Appeals.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals err by misstating and misunderstanding the record and the Trial Court's Order which misstatements and misunderstandings served as the basis for reversal?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**DID NOT ADDRESS**
The Court of Appeals Answered:	**"No"**

II. Did the parties at the time of contracting operate under two mutual mistakes of fact, either of which would be sufficient to warrant contract rescission, where it is undisputed that each mistakenly believed that (a) the buyer-Stadium Authority had the power to take Alibri's property by condemnation if she did not sell, and that (b) the Stadium Authority had the ability to acquire an adjoining property that was to serve as the benchmark for the price Alibri would receive?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**"Yes"**
The Court of Appeals Answered:	**"No"**

III. Are the misrepresentations of a Stadium Authority regarding (a) its ability to condemn Alibri's west-side property and/or (b) its ability to acquire an adjoining property that was to serve as the benchmark for the price Alibri would receive constitute an innocent misrepresentation sufficient to justify rescission of the contract, where it is undisputed that Alibri relied on those misrepresentations in agreeing to sell?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**"Yes"**
The Court of Appeals Answered:	**"No"**

IV. Does a contract fail for lack of consideration where the buyer, a public Stadium Authority, induces a private seller, Alibri, to sell by (a) representing that the purchase price of Alibri's property would be set by the Stadium Authority's purchase of a second property when the Stadium Authority neither bought nor had the ability to acquire the second property and (b) threatening to condemn Alibri's property, when it at no time had the ability to condemn the property as it had threatened to do?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**"Yes"**
The Court of Appeals Answered:	**"No"**

V. Did the Trial Court properly invoke its equitable powers in rescinding the contract, where its findings show that the public Stadium Authority threatened to use its powers of eminent domain, when no such power existed, while effectively serving as a "straw man" for a private developer's below-market acquisition of private property, and essentially doing indirectly what it is constitutionally prohibited from doing directly?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**"Yes"**
The Court of Appeals Answered:	**"No"**

VI. Did the Court of Appeals exceed its scope of review and/or commit reversible error by relying on a legal theory (i.e. waiver) when: (a) the Stadium Authority failed to raise the issue on appeal; (b) the Stadium Authority's own admissions preclude such a finding; and (c) the authority relied on by the Court of Appeals is inapplicable to the case before the Court?

Appellant Answers:	**"Yes"**
Appellee Answers:	**"No"**
The Trial Court Answered:	**"DID NOT ADDRESS"**
The Court of Appeals Answered:	**"No**

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Beginning in the early 1950's, Alibri began purchasing land in the City of Detroit that her family operated as parking lots. She owned numerous parcels in the City, including parcels on the east and west side of Woodward in what is today known as the Foxtown area. The property involved in this appeal is situated on the west side of Woodward Avenue behind the Fox Theatre in Downtown Detroit. This area, along with the east side of Woodward Avenue, was the "hotbed" of development activity from 1994 through 1996. At one time the east-side was going to be developed as a casino site and the west-side was to become the site of a new stadium for the Detroit Tigers. The casino development never materialized and toward the latter part of 1996, the Stadium Authority was formed and undertook plans to develop the east-side as the home of two new stadiums for the Detroit Tigers and Detroit Lions. It was at this time, starting in September, 1996, that the Stadium Authority approached Alibri to discuss the acquisition of her east-side property.

The Stadium Authority engaged the Farbman Land Acquisition Group to represent it in conducting all negotiations with private landowners for the acquisition of property for use in the Tigers/Lions Stadium project situated on the east side of Woodward Avenue. During this time period, Jerald Rosenfeld, Vice President of the Farbman Group and President of the Farbman Land Acquisition Group, contacted Alibri with respect to obtaining property she owned on the east side of Woodward Avenue. **(Apx. 87a, 89a-90a).**[1] In October 1996, and notwithstanding the determination that the Stadiums would be built on the east side of Woodward, the Stadium Authority began

[1] References to "Apx" are to Appellant's appendix filed concurrently with this brief.

pursuing Alibri's property on the west side ("west-side property" or "underlying property"). In fact, the Stadium Authority represented that it intended to acquire, by purchase or condemnation, all of the west-side properties in the Stadium Project Area in order to implement the Stadium Project.[2]

Negotiations

During the negotiations, the Stadium Authority explicitly stated that if Alibri's properties on the east and west sides could not be purchased through negotiation, then the Stadium Authority would immediately take them through condemnation. **(Apx. 103a; 114a)**. The Stadium Authority represented that enough land had to be acquired "quickly" in order to lock the Detroit Lions and Detroit Tigers into building the Stadiums. **(Apx. 114a).** The Stadium Authority further represented that if it failed to acquire enough property, that the Detroit Tigers and Detroit Lions could terminate the agreement and the Stadiums would not be built.

During the negotiations for the underlying property, Alibri raised the concern that the Stadium Authority was pursuing the underlying property on behalf of an Ilitch-owned entity. **(Apx. 103a; 118a-119a).** Despite Alibri's direct inquiry, the Stadium Authority categorically denied any such deal and did not disclose any arrangement with another private developer to use, or to purchase the underlying property. **(Apx. 120a-122a).**

On October 31, 1996, the Stadium Authority explicitly stated that it was purchasing all of Alibri's property under threat of condemnation. **(Apx. 117a)**. Given the representations made by the Stadium Authority that (1) it would condemn her

[2] Only the Alibri's west-side property was acquired by the Stadium Authority. Everyone else on the west-side was able to either maintain ownership of their property, or sell it to an Ilitch owned entity in an arms lengths transactions for an amount 10 times greater than Alibri received from the Stadium Authority.

property immediately, (2) it needed the property to ensure that the stadiums would be built, (3) it was going to take the entire west side Project Area, (4) it was going to pay her the fair market value for the west-side properties when it acquired the neighboring property, and (5) it was not going to transfer her property to another private developer, Alibri agreed to enter into an option agreement.

On October 31, 1996, the parties executed an Option Agreement. The Option Agreement involved in this case covers parcels on the east-side of Woodward and five (5) parcels on the west-side, which are the subject of this appeal. The total purchase price for the west-side properties was $267,100.00 or $6.85 per square foot.

In connection with the west-side properties, the Stadium Authority repeatedly represented that it was acquiring by sale or condemnation all of the land in the area. It was Alibri's understanding that the owners of the property adjacent to the underlying property, Nick and Lorna Abraham, were friends with Wayne County Executive, Ed McNamara, and would more easily obtain the fair market value for their properties when the Stadium Authority acquired it as part of its purported plan to take the entire west-side Project Area. Since the underlying property was the first west-side property to be acquired by the Stadium Authority, and a true market value had not yet been established, Alibri agreed to temporarily accept the below market value of $6.85 a square foot. Alibri and the Stadium Authority further agreed, however, that the price for the underlying property would be the higher of the agreed upon price or that realized per square foot by the Abrahams for their adjoining property that the Stadium Authority was

going to acquire **(Apx. 128a)**.[3] This covenant was drafted to protect Alibri's interest in receiving the fair market value of her property, and to facilitate the Stadium Authority's purported need to acquire enough property "quickly in order to lock the Detroit Lions and Detroit Tigers into building these stadiums." **(Apx. 114a)**.

The Stadium Authority, however, did not disclose the fact that it did not have a plan in place for the use of the underlying property (i.e., west-side property), that it had no funds available to purchase or condemn any west-side property, including the Abraham property that was to serve as the benchmark for the value of Alibri's property, or that it was purchasing the underlying property on behalf of the Detroit Tigers or one of the Ilitch owned entities. In fact, the Stadium Authority did not disclose to Alibri that it had no present ability to follow through on its threat to immediately condemn.

Under the Michigan Uniform Condemnation Procedures Act ("UCPA"), MCL 213.55(4)(a)(5), a condemning authority in addition to other things, must have a plan showing the property to be taken, an intended use for the property and to have deposited the amount of just compensation in a bank or trust before it can initiate condemnation proceedings. Discovery in this matter revealed, however, that the Stadium Authority had no plan for the use of the west-side properties and no funding available to purchase or condemn west-side properties at the time it threatened to condemn the underlying property. **(Apx. 5a; 135a)**. Thus, contrary to its representations at the time of contracting, the Stadium Authority had no present ability to condemn west-side properties as it had threatened.

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[3] It was anticipated that the purchase of the Abraham property, and other west-side properties, would most likely occur after the closing, and that it could take years to acquire if condemnation was necessary.

Moreover, the Stadium Authority, contrary to its explicit representations, never initiated any attempt to purchase or condemn any of the property on the west side of Woodward after November 6, 1996, which was two months before the Stadium Authority closed on the Alibri property. **(Apx. 91a)**. Finally, it has been discovered that Olympia Entertainment, an Ilitch-owned corporation, purchased the Abraham property for $50.00 a square foot shortly after the Stadium Authority purchased the underlying property from Alibri. **(Apx. 146a-154a)**.

During discovery in this matter the Stadium Authority admitted that they had heard that Ilitch-owned entities were purchasing properties on the west side of Woodward in the Project Area during the time the Stadium Authority was allegedly pursuing condemnation (which it was not and could not) in the area. **(Apx. 100a)**. In fact, Ilitch-owned entities began purchasing properties in the area in November 1996, two months before the Stadium Authority closed on the underlying property, and to date have acquired almost all of the land in the former west-side Stadium Project Area. **(Apx. 155a)**.

Closing

On January 3, 1997, the closing on the purchase of all the Alibri property was held. The attorney for Ilitch owned entities, including the Detroit Tigers, appeared at the closing. Alibri's representative asked why he was present and was advised that the Detroit Tigers were simply loaning the Stadium Authority money to purchase the west-side properties only.[4] The Stadium Authority also denied that they were going to

[4]Indeed, the Stadium Authority's own representative, Jerry Rosenfeld, testified that he thought it was "peculiar" that someone from the Tigers was present at Alibri's closing. **(Apx. 98a)**.

transfer the underlying property to the Detroit Tigers or any other Ilitch owned entities. **(Apx. 122a)**.

After the closing on Alibri's property, the Stadium Authority and the Detroit Tigers entered a Second Amendment to the Concession Agreement in which the Stadium Authority formerly acknowledged their agreement to transfer the underlying property to the Detroit Tigers contrary to its representations at the time of contracting with Alibri. This amendment also provided that the Detroit Tigers were to indemnify the Stadium Authority from any claims arising from such sale. **(Apx. 158a-159a)**.[5] Two days later, the Stadium Authority rescinded its Declaration of Necessity for the west-side Project Area for the purported reason that the property was no longer necessary for the Stadium Project. **(Apx. 165a)**. The arrangement with the Detroit Tigers and abandonment of the west-side Project Area are directly contrary to the representations made by the Stadium Authority at the time of contracting with Alibri.

Litigation

Alibri was first made aware of the Stadium Authority's possible transfer of the underlying property in October, 1997. **(Apx. 167a)**. The Stadium Authority did not respond to Alibri's inquiries. On November 12, 1997, Alibri again requested an explanation from the Stadium Authority regarding the then purported arrangement to transfer the underlying property to another private entity. **(Apx. 168a-169a)**. Rather than address the matter directly, Mike Duggan, Deputy Wayne County Executive at the

[5] Even for a sophisticated business enterprise like the Detroit Tigers, the receipt of property worth in excess of $2,000,000 in return for a 16-month "loan" of $267,100.00 is incredible.

time, on behalf of the Stadium Authority, attempted to bully Alibri by casting aspersions at her, calling her greedy and challenging her to initiate legal action. **(Apx. 170a-171a)**.

After completion of discovery and hearing numerous motions as well as conducting meetings with the parties on several occasions, the Trial Court granted Alibri's Motion for Partial Summary Disposition. (**Apx. 58a-68a)**. The basis of the Trial Court's Order was that the contract for the sale of the west-side properties should be rescinded based on mutual mistake, innocent misrepresentation and/or failure of consideration and the equities in the case. **(Apx. 58a-68a)**. As discussed in detail below, the Court of Appeals was only capable of reversing the Trial Court's Order because it ignored undisputed facts and misstated the reasoning of the Trial Court. Contrary to the Court of Appeals summary of the Trial Court's Order, the written Order of the Trial Court demonstrates that it made the following findings based on undisputed facts which the Court of Appeals wholly ignored:

1. That in order to induce Alibri to sell the west-side property, the Stadium Authority explicitly represented it was going to acquire the property owned by the Abrahams and agreed to pay Alibri the difference of the square footage price paid by the Stadium Authority to Alibri for the west-side property and the per square footage price paid to Abraham, **(Apx. 59a)**;

2. That the Stadium Authority expressly represented that it was going to acquire all of the west-side properties in the Stadium Project Area, **(Apx. 59a)**;

3. That consideration for the sale was the Stadium Authority's representation that it would exercise its powers of eminent domain and condemn the west-side property if Alibri refused to sell, **(Apx. 59a)**;

4. That the Stadium Authority did not have, and never has had, the funding available for the purchase or condemnation of the west-side properties or any properties located on the west-side of the Stadium Project Area, **(Apx. 60a)**;

5. That the Stadium Authority did not have plans in place to use the west-side properties or any properties in the west-side Stadium Project Area for use in the Stadium Project, **(Apx. 60a)**;

6. That the Stadium Authority did not purchase the Abraham property, and the Stadium Authority never attempted to acquire any west-side properties, **(Apx. 60a)**;

7. That the Stadium Authority borrowed money from the Detroit Tigers to buy Alibri's west-side properties, however, the Stadium Authority expressly represented it was not purchasing those properties for the Detroit Tigers, **(Apx. 60a)**;

8. That the Stadium Authority agreed to repay that "loan" by transferring ownership of the west-side property to the Detroit Tigers, **(Apx. 60a)**.

9. That the Stadium Authority rescinded its Declaration of Necessity regarding the west-side properties in the Stadium Project Area finding there was no necessity for the purchase or condemnation of west-side properties. **(Apx. 60a).**

Based on the above **undisputed facts**, the Trial Court applied the law of rescission and properly found that the October 31, 1996 contract should be rescinded with respect to the underlying property **for six separate and independent reasons**:

A. That the contract should be rescinded based on the undisputed fact that a mutual mistake of fact, relating to a basic assumption of the parties, existed at the time of contracting. Specifically:

   1. That both Alibri and the Stadium Authority believed that the west-side property would and could be condemned if a sale was not achieved when, in fact, the Stadium Authority had no ability to condemn;

   2. That the Abraham covenant was included in the contract in order to induce Alibri to sell the west-side property and that both Alibri and the Stadium Authority believed the Abraham property would and could be acquired by the Stadium Authority when, in fact, the Stadium Authority's promise and representation was illusory since it did not have the ability to acquire the Abraham property.

B. That the contract should be rescinded based on the representation by the Stadium Authority, and relied on by Alibri, that it would condemn the west-side property unless it was sold and that it would pay Alibri what the Abrahams received because such statements constituted an innocent misrepresentation. Specifically:

3. The Stadium Authority could not condemn the west-side property at the time of contracting as it represented;

4. The Stadium Authority could not acquire the Abraham property at the time of contracting, or at any time thereafter, as it represented.

C. That consideration for the sale of the west-side property was the Stadium Authority's threat of condemnation and promise to pay Alibri what the Abrahams received, and that such consideration failed because:

5. The Stadium Authority did not have the ability to condemn the west-side property;

6. The Stadium Authority did not have the ability to acquire the Abraham property.

(Apx. 61a-65a).

The Trial Court further held that the equitable considerations weighed decidedly in favor of Alibri and supported rescission. Specifically the Trial Court stated:

> The Court further finds that a rescission of the October 31, 1996 Option for Purchase of the underlying properties will not result in any loss to the Stadium Authority. As a result of this decision, the Stadium Authority will receive the sums it paid Plaintiff for the underlying properties and, therefore, will be able to repay in full the loan it received from the Detroit Tigers to purchase the underlying properties. The Court further finds that Plaintiff would improperly assume the loss of this transaction if the October 31, 1996 Option for Purchase of the underlying properties is not rescinded. As a result of the representations made by the Stadium Authority regarding its ability to condemn the underlying properties and its purchase of the Abraham/Postestivo properties, Plaintiff agreed to sell the underlying properties at a below market value price. As the Stadium Authority neither had the ability to condemn the underlying properties nor to purchase the Abraham/Postestivo properties, Plaintiff has been deprived of her property and precluded from

> engaging in the free market. The Stadium Authority has rescinded its Declaration of Necessity indicating that the west-side properties are not necessary for the Stadium Project. Plaintiff, therefore, should be given her property back to continue her operation of a parking lot or to engage in direct negotiations with the Detroit Tigers for the sale of the property as other west-side property owners have during the past few years.
>
> The Court further finds that it is not good policy for a governmental entity with powers of eminent domain to threaten condemnation if a sale of the property is not reached with the property owner, and to then borrow the money from another private entity developer in the area, and then to repay the loan by transferring the purchased property to the private entity developer who loaned the money.

(Apx. 65a-66a).

On December 27, 2002, the Court of Appeals, in a published Opinion, repeatedly misstated the reasoning applied by the Trial Court and ignored the undisputed facts relied on by the Trial Court on its way to erroneously reversing that decision. **(Apx. 71a-80a).** On January 17, 2003, Alibri submitted her Application for Leave to Appeal, or for Peremptory Reversal. On November 13, 2003, this Court granted leave. **(Apx. 84a)**.

INTRODUCTION

The Court of Appeals reversal of the Trial Court, and its entry of Summary Disposition for the Stadium Authority is both contractually and constitutionally erroneous. With regard to this specific case, the Court of Appeals, in its haste to achieve a desired result, simply ignored the reasoning and undisputed findings of fact by the Trial Court in its July 11, 2000 Order. On a broader scale, the Court of Appeals Opinion sends a signal to all condemning agencies that playing fast and loose with the powers of eminent domain is not only permissible, but appropriate. In short, that as long as a physical "taking" does not occur, a condemning authority can lawfully acquire

property that it does not need and give it to another private party by threatening condemnation and making other promises based on such a threat, even though the threat and promises are illusory. The net effect of the Court of Appeals' published Opinion is to sanction the conduct of a condemning authority to do indirectly what it cannot do directly.

This Court cannot turn a blind eye to what is happening in this case and should reverse the Court of Appeals. Specifically, the Court of Appeals made the following reversible misstatements:

1. That the Trial Court analyzed this as a "takings" case, **(Apx. 75a)**; when, in fact, the Trial Court analyzed this as a rescission of contract case;

2. That Alibri admitted the Stadium Authority could take her property and then decide to transfer it to the Detroit Tigers, **(Apx. 73a)**; when, in fact, she explicitly did not;

3. That the Stadium Authority's "present ability" to immediately condemn Alibri's property at the time of contracting was immaterial, **Apx. 75a)**; when, in fact, it is undisputed that a basic understanding of the parties and the reason Alibri agreed to sell the west-side properties was based on the mistaken belief that the Stadium Authority did possess the "present ability" to condemn the west-side as represented when it legally did not;

4. That the Abraham covenant in the contract could not serve as a basis for rescission based on mutual mistake and/or innocent misrepresentation because it related to the occurrence of a future event, **(Apx. 78a-79a)**; when, in fact, the Trial Court's rescission based on mutual mistake and innocent misrepresentation as it related to the Abraham covenant was premised on the existing mistake of fact and/or innocent misrepresentation at the time of contracting that the Stadium Authority could acquire the Abraham property when it legally could not;

5. That the Abraham covenant could not serve as a reason to rescind the contract based on innocent misrepresentation because there was no evidence that the Stadium Authority misrepresented its intent to condemn the west-side, there was no false statement, and

no evidence of reliance by Alibri, **(Apx. 79a)**; when, in fact, the Trial Court rescinded the contract based on the Abraham covenant not because of intent but because the Stadium Authority had no legal authority to acquire that property at the time of contracting as it represented; the Stadium Authority's representation was factually false; and it is undisputed that Alibri relied on this representation;

6. That the Abraham covenant only applied if the Stadium Authority acquired the Abraham property, **(Apx, 76a)**, when, in fact, the contract does not contain the word "if" and it is undisputed that the parties understood that the Stadium Authority would and could acquire the Abraham property when, in fact, it had no such ability.

7. That all of the theories relied upon by the Trial Court to rescind the contract were waived by Alibri when she proceeded to closing in January 1997, **(Apx. 76a; 78a-79a)**; when, in fact, the theory relied on by the Court of Appeals was contrary to the Stadium Authority's admissions; was not addressed by the Trial Court in entering the July 11, 2000 Order; is fundamentally erroneous; and was not raised by the Stadium Authority on appeal;

8. That the Trial Court failed to articulate sufficient equitable considerations despite the undisputed fact that the Stadium Authority's inducement of Alibri to sell property under threat of condemnation when it had no ability to condemn, to promise to pay Alibri the fair market value when it acquired the Abraham property when it had no legal ability to do so, to borrow money from a private entity and represent that it was not going to transfer it to that entity only to subsequently agree to pay back the "loan" by transferring the property to that entity that at the time was worth in excess of 10 times the value of the "loan"; when, in fact, such conduct is inherently inequitable, an abuse of a condemning authority's power of eminent domain, and establishes a dangerous precedent for this State.

9. The Court of Appeals' published Opinion expands the statutory and constitutional powers of the Stadium Authority, and provides a road map for all condemning authorities to follow in the future in order to relieve themselves of the constitutional and statutory limitations placed on the power of eminent domain by encouraging such public entities to achieve indirectly what it is prohibited from doing directly.

Unless this Court reverses the Court of Appeals, not only will Alibri lose ownership of her property as a result of an impermissible scheme implemented by a condemning authority out of control, but a dangerous precedent will have been adopted

in this State providing a judicially endorsed blueprint for all condemning authorities to follow in order to avoid the limitations placed on their eminent domain powers by the Michigan Constitution and Legislature. This State will have a published decision that sanctions a condemning authority achieving indirectly what it is prohibited from doing directly. That is, that a condemning authority can acquire property by threatening to immediately condemn it when, in fact, it has no ability to condemn; a condemning authority can promise to pay fair market value when it acquires neighboring property when, in fact, it has no ability to acquire it; that a condemning authority can promise not to transfer the property it acquires to another private party when, in fact, it "borrows" money from another private party, rescinds its Declaration of necessity and then agrees to pay back the "loan" with the property it acquired under a threat of condemnation. More than an appearance of impropriety – the conduct of the Stadium Authority is both contractually and constitutionally improper. It represents a clear abuse of the power of eminent domain.

This Court is all that is standing in the way of such a result. Alibri is not seeking monetary damages for millions of dollars. All she is asking for is the return of her property since the reasons for the sale do not, and did not, exist.[6]

[6] This is not a case of "greed" as Mr. Duggan stated, **(Apx. 171a)**, or of seller's remorse as the Court of Appeals seems to believe. Rather, this is a case of a property owner who continued to monitor the activities of the Stadium Authority to make sure it fulfilled its contractual obligations.

ARGUMENT

1. The Court of Appeals Committed Reversible Error By Exceeding the Scope of Its Review, Misstating the Basis for the Trial Court's Order and/or Ignoring the Undisputed Facts.

A. Standard of Review

The Court reviews a trial court's grant of summary disposition de novo. Citizens Ins Co v Osmoses Woods Preserving, Inc, 231 Mich App 40, 43; 585 NW2d 314 (1998); Michigan Mutual Ins Co v Dowell, 204 Mich App 81, 86; 514 NW2d 185 (1994). Summary disposition is appropriate under MCR 2.116(C)(10) when a party fails to raise a genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law.

To create a genuine issue of material fact necessary to defeat summary disposition, a defendant must do more than present some evidence on a disputed issue; the evidence must be more than colorable and must be significantly probative. See Skinner v Square D Co, 445 Mich 153, 166 n10; 516 NW2d 475 (1994). Moreover, conclusory allegations and hearsay cannot defeat a motion for summary disposition. See Quinto v Cross and Peters Co, 451 Mich 358, 372; 547 NW2d 314 (1996); Dillon v Denooyer Chevrolet GEO, 217 Mich App 163, 168; 550 NW2d 846 (1996).

In the present case, the Trial Court's July 11, 2000 Order is based on undisputed facts applied to the law of rescission of contract. "Rescission is an equitable remedy which is granted only in the sound discretion of the court." Dingeman v Reffitt, 152 Mich App 350, 355; 393 NW2d 632 (1986). Equitable actions, including actions to rescind a contract, are reviewed de novo; however, the factual findings of the trial court in an action to rescind a contract are reviewed for clear error. MCR 2.613(C); Lenawee

Board of Health v Messerly, 417 Mich 17, 31; 331 NW2d 203 (1982). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. Meek v Dep't of Transportation, 240 Mich App 105, 115; 610 NW2d 250 (2000).

Finally, a court speaks through its orders, and the Court of Appeals' jurisdiction is limited to a review of the questions presented to and decided by the trial judge. Stockler v Rose, 174 Mich App 14, 54; 436 NW2d 70 (1989); Napier v Jacobs, 429 Mich 222, 234-235; 414 NW2d 862 (1987). By misstating the basis for the Trial Court's Order, the Court of Appeals has exceeded its scope of review and ignored the undisputed facts underlying the Trial Court's proper grant of summary disposition in favor of Alibri.

B. The Trial Court Did Not Analyze this as a Physical "Takings" Case

The primary basis for the Court of Appeals reversal is premised on the erroneous belief that the Trial Court "fundamentally erred by analyzing this case as a 'taking,' which occurs when the government physically appropriates private property or regulates it 'too far.'" **(Apx. 75a)**. Thus, since neither of these events occurred in this case, the Court of Appeals reasoned that the Trial Court's reference to the Uniform Condemnation Procedure Act ("UCPA") was inappropriate because the requirements of the UCPA are only triggered when a complaint for condemnation is filed. Since no complaint for condemnation was filed, the Court of Appeals held that the Stadium Authority's admitted inability to condemn the underlying property at the time it threatened to condemn was "immaterial." **(Apx. 75a)**. The Court of Appeals erroneous interpretation of the Trial Court's Order is critical since it served as the basis for

reversing all six independent reasons for rescission articulated by the Trial Court. (See pp. 8-9 above)

Contrary to the Court of Appeals holding, there was no claim, or finding by the Trial Court, that the Stadium Authority violated the UCPA by filing a complaint for condemnation in contravention of the statute. Rather, the Trial Court concluded that the Stadium Authority's undisputed threat to condemn the underlying property at the time of contracting was false given the undisputed fact that such action could not be legally pursued at the time the representations were made.[7]

Moreover, the requirements of the UCPA demonstrated the falsity of the Stadium Authority's ability to condemn at the time it threatened such action. Since the Stadium Authority's ability to immediately condemn Alibri's, and all west-side properties, was a basic understanding of the parties leading to the formation of the contract, the Trial Court properly found that rescission was appropriate based on mutual mistake, innocent misrepresentation and/or failure of consideration, and because of the equities in the case.

Under the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51, et seq., a condemning authority, such as the Stadium Authority must have, in part, at the time condemnation proceedings are initiated (1) a plan showing the property to be taken, (2) an intended use for the property and (3) have deposited the amount estimated to be just compensation with a bank, trust company, etc. MCL 213.55(4)(a)(5). Notwithstanding the Stadium Authority's threat of condemnation on

[7] Notwithstanding the fact that a physical taking was not alleged or considered by the Trial Court, the notion that the UCPA is not implicated by the Stadium Authority's conduct is contrary to Oakland Hills v Luedens Drain, 212 Mich App 284, 290; 537 NW2d 258 (1995).

October 31, 1996, **(Apx. 117a),** and the Stadium Authority's undisputed representations that it could have condemned the west-side property at the time of contracting, **(Apx. 114a)**, the Stadium Authority, in fact, **could not have initiated condemnation at that time** according to the clear terms of the UCPA. By the Stadium Authority's own admissions there was, and is, no plan in existence regarding the use of the underlying property or any west-side properties in the Stadium Project, **(Apx. 5a)** and there never were any funds available (or attempts made to procure them), to enable the Stadium Authority to purchase or condemn the underlying property or any property in the west-side Project Area. **(Apx. 135a)**. By statute, the Stadium Authority's threat of condemnation at the time of contracting was a subterfuge. It was based on these representations, along with the representations that it needed to have a certain amount of properties under control to lock the Lions and Tigers into building the Stadiums and its representation that it was not going to transfer the property to another private entity, that Alibri agreed to enter into the contract for sale of the west-side properties. **(Apx. 114a; 120a-123a[8]).**

i. Motion to Amend Makes It Clear That Physical "Taking" Not at Issue or Alleged

The error of the Court of Appeals finding that the Trial Court analyzed this as a physical "takings" case is demonstrated conclusively by the circumstances leading to Alibri's amendment of her Complaint. On April 16, 1999, the Stadium Authority filed a Motion to Strike certain counts of Alibri's Complaint arguing that those counts were premised on a physical taking having occurred. **(Apx. 10a-11a; 15a-18a)**. Alibri denied

[8] The Stadium Authority did not depose Mr. Alibri. As such, his affidavit stands unrefutted.

this accusation, **(Apx. 28a-29a)**, and the Trial Court allowed Alibri to amend her Complaint to clear up any confusion in this regard. **(Apx. 31a-53a)**. Thus, rather than analyze this as a physical "takings" case, the Trial Court explicitly allowed Alibri to amend her Complaint to clarify that a physical taking was neither alleged nor at issue. Nowhere in the Trial Court's July 11, 2000 Order is the word "taking" used or is a conclusion of law premised on a physical "taking" having occurred.

The Court of Appeals' finding that the Trial Court analyzed this as a physical "takings" case, which it did not, is an error from which much of its opinion springs. Once corrected, the Court of Appeals' Opinion cannot be reconciled with the law or the undisputed facts, and should be reversed.

2. The Trial Court's Conclusion that the October 31, 1996 Contract Should be Rescinded Based on the Mutual Mistake and/or Innocent Misrepresentation is Based on Undisputed Facts and Should Not Have Been Reversed.

A. Standard of Review

The decision to rescind the underlying contract in connection with the underlying property is an equitable remedy within the sound discretion of the Trial Court. Dingeman v Reffitt, 152 Mich App 350, 355; 393 NW2d 632 (1986). As such, the Court of Appeals was required to find an abuse of discretion in order to reverse the Trial Court.

As this Court in Alken-Ziegler, Inc. v Waterbury Headers Corp., 461 Mich 219, 227-228; 600 NW2d 638 (1999) held:

> An abuse of discretion involves far more than a difference in judicial opinion. [citation omitted]. It has been said that such abuse occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of

> judgment but defiance thereof, not the exercise of reason but rather passion or bias.'

Rescission of contract is appropriate:

> Where the breach substantially limits the non-breaching party from receiving the benefit of his bargain, the breach is deemed material and the victim of the breach may rescind.

P.A.L. Investment Group, Inc v Staff-Builders, Inc, 118 F Supp 2d 781, 787 (ED Mich 2000).

Moreover, this Court has held:

> . . . rescission is permissible when there is a failure to perform a substantial part of the contract on one of its essential items, **or where 'the contract would not have been made if default in that particular had been expected or contemplated.'** [citations omitted]

Rosenthal v Triangle Development Co, 261 Mich 462, 464; 246 NW 182 (1933).[9]

In the present case, there is no serious dispute that Alibri would not have executed the contract to sell her west-side properties had the Stadium Authority's inability to condemn any west-side Project Area properties or agreement to transfer her property to the Detroit Tigers been expected or contemplated. As such, the Court of Appeals has simply substituted its opinion that rescission was inappropriate because the Detroit Tigers were a "major beneficiary and benefactor." **(Apx. 80a)**. This, of course, falls well short of a finding that a trial court abused its discretion.

B. Mutual Mistake

Michigan law explicitly recognizes the discretion of the court to rescind a contract for the sale of real estate that is premised on a mutual mistake of fact. This

[9] See also, Hauler v Parkland Development of West Michigan, Inc, unpublished opinion per curiam of the Court of Appeals, decided August 19, 2003 (Docket No. 240753).

Court in Lenawee Bd. of Health v Messerly, 417 Mich 17, 31-32; 331 NW2d 203 (1982), demonstrates the propriety of the Trial Court's actions in this case when it stated:

> In cases of mistake by two equally innocent parties, we are required, in the exercise of our equitable powers, to determine which blameless party should assume the loss resulting from the misapprehension they shared. Normally that can only be done by drawing upon our '**own notions of what is reasonable and just under all the surrounding circumstances**.'

The decision in Kroninger v Anast, 367 Mich 478; 116 NW2d 863 (1962) is also instructive. In Kroninger, the defendant represented to plaintiff that the building being sold could be used as a seven family apartment complex because defendant had used it as such for several years. Plaintiff relied on these representations and purchased the building. When plaintiff attempted to operate the property as an apartment building, the City rejected the permit application. Id. at 479. Plaintiff then brought suit to rescind the contract for sale. Defendant responded claiming any misrepresentation was made innocently, and that it had no reason to believe that there would be any problem with operating the structure as an apartment building. This Court found that plaintiff relied on this representation and ruled, "[t]he representation even though honestly believed by defendant Anast made out a case of fraud warranting rescission." Id. at 481.

Kroninger quoted from the decision in Converse v Blumrich, 14 Mich 109 (1866), which has particular relevance to the situation before this Court wherein it is stated:

> If one obtains the property of another, **by means of untrue statements**, though in ignorance of their falsity, he must be held responsible for illegal fraud.

The Michigan Court of Appeals' decision in Schmude Oil v Omar Operating, 184 Mich App 574; 458 NW2d 659 (1990) also supports rescission in the present case on

the basis of mutual mistake. In Schmude, plaintiff held a leasehold interest in land on which defendants were interested in drilling. Id. at 578. Defendants induced plaintiff to enter a joint operating agreement ("JOA") based on the mistaken belief that plaintiff held a 25% interest in the land to be drilled when, in fact, his interest was only 9%. Id. at 587. The Court concluded that the JOA should be rescinded based on the mutual mistake of the parties which induced plaintiff to sign the agreement. Id.

In reaching its conclusion that the October 31, 1996 contract should be rescinded with respect to the west-side properties, the Trial Court properly found that the Stadium Authority's representation that it would pay Alibri what it paid Abraham, and that it was going to and could acquire the Abraham property were basic assumptions that induced Alibri into executing the contract. **(Apx. 59a-61a)**. In fact, the issues relating to the Abraham property were specifically set forth in the contract between the parties. The Abraham covenant states:

> It is further agreed between optionor [Plaintiff-Appellee] and optionee [Defendant-Appellant] that the per square foot price paid to optionor for the property located on the west-side of Woodward **shall be equal to the price per square foot paid by optionee** (which includes the swapping of land or any other form of consideration) to the owners of the parcel located on Elizabeth and Park Avenue for the property located on Elizabeth and Park Avenue (identified as Ward 2, Item 413) [the Abraham property] **(Apx. 128a)**.

The Stadium Authority argued that the Abraham covenant only applied "if" the Abraham property was acquired and, at a minimum, there was an ambiguity in the contract that should be resolved by the trier of fact. **(Apx. 57a)**. In order to determine whether or not an ambiguity existed, as contended by the Stadium Authority, the Trial

Court considered the unrefuted affidavit of James Alibri and the testimony of Mike Duggan and Jerry Rosenfeld.[10] Specifically, Mr. Duggan stated:

> I assured him that the Abrahams had no such political pull within the administration, and that I would gladly agree that if the Stadium Authority ever paid more for the Abrahams' property than for his, we would raise the purchase price he was paid to the price the Abrahams were paid. **That [the Abraham covenant] was the only way to deal with this conception he had that the County or the Stadium Authority wanted to give the Abrahams a windfall. (Apx. 134a)**.

There is also no dispute that the Stadium Authority represented that it could have acquired or condemned all west-side properties, including the Abraham property, at the time of contracting when, in fact, it could not. Support for this conclusion is not premised on the conjecture of Alibri, but on the affidavit of Mike Duggan, **(Apx. 114a)**, and the deposition testimony of Jerry Rosenfeld, **(Apx. 93a),** both of whom were Stadium Authority representatives.[11] There is no dispute that Alibri relied on this representation. **(Apx. 120a-122a)**. Finally, the undisputed fact that the Stadium Authority was incapable of acquiring the Abraham property, and any west-side property, was confirmed by the deposition testimony of Mike Duggan. **(Apx. 135a).**

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[10] The consideration of whether an ambiguity to a contract exists is a question of law. Farm Bureau Mut Ins Co v Nikkel, 460 Mich 558, 563; 596 NW2d 915 (1999). The consideration of extrinsic evidence is wholly appropriate in order to determine whether an ambiguity exists. Goodwin, Inc v Orson E Coe Pontiac, 392 Mich 195, 209-210; 220 NW2d 664 (1974).

[11] The Trial Court considerations of these representations, and the other representations that induced Alibri to execute the contract for the sale of the underlying property was wholly appropriate since the underlying contract did not contain an integration clause. NAG Enterprises v All Star Industries, Inc., 407 Mich 407, 409-411; 285 NW2d 770 (1979).

There is equally no dispute that the Stadium Authority failed to purchase or condemn the Abrahams' west-side property.[12] In fact, Olympia Entertainment (an Ilitch-owned entity) purchased it for $50.00 per square foot shortly after Alibri sold her property for one-eighth that amount. **(Apx. 146a-154a)**.

Incredibly, the Court of Appeals ignored the decisions in Schmude, Kroniger and Converse and the undisputed facts underlying the Trial Court's decision. Instead, the Court of Appeals, consistent with the entirety of its Opinion, misstates the basis of the Trial Court's Order. Specifically, the Court of Appeals incorrectly found no mutual mistake based on the threat of condemnation because the Trial Court incorrectly analyzed this as a "takings" case,[13] and no mutual mistake of fact based on the Abraham covenant because that related to the occurrence or non-occurrence of a future event. **(Apx. 78a).** The foundation for the Court of Appeals' holding is simply erroneous.

Again, the Stadium Authority explicitly stated that it was purchasing the west-side property under threat of condemnation. **(Apx. 117a).** Moreover, Mr. Rosenfeld testified that Alibri was told that the underlying property would be condemned if it was not sold. **(Apx. 103a).** Mr. Duggan submitted an affidavit that stated the Stadium Authority could have condemned **at the time of contracting** with Alibri. **(Apx. 114a)**. Relying on this threat and other misrepresentations, Alibri executed the contract for the sale of the underlying property. **(Apx. 120a-123a)**. These were all basic assumptions of the parties that induced Alibri to execute the underlying contract.

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[12] Indeed, only Alibri's west-side property was acquired by the Stadium Authority. **(Apx. 135a.**

[13] This misstatement of the Court of Appeals is discussed at length above.

The Stadium Authority subsequently admitted that the underlying property was not needed for a public purpose. **(Apx. 165a).** Moreover, the Stadium Authority never had the ability to condemn as threatened since no plans existed, or ever existed, for the use of the underlying property and no attempt to procure funding for the purchase or condemnation of west-side properties was ever initiated. **(Apx. 5a; 135a)**. Thus, similar to the plaintiff in Schmude, Alibri was induced into selling the west-side property based on the mistaken belief that the Stadium Authority had the ability to condemn, as threatened, if a sale could not be reached. Likewise, Alibri was induced into selling the west-side property under the belief that the Abraham property would be acquired when, in fact, the Stadium Authority never had the ability to acquire it. As such, it cannot be disputed that the underlying contract was based on illusory promises and representations that related to purported facts in existence at the time of contracting which alleged facts induced Alibri to execute the contract.

Similar to the plaintiff in Converse, supra, the Stadium Authority has obtained the underlying property by means of an untrue statement, even if it was ignorant of the statement's falsity. Thus, under Michigan law, there was a mutual mistake of fact in existence at the time of contracting that justifies rescission. The Court of Appeals simply misstated the basis of the Trial Court's Order and ignored the undisputed facts. As demonstrated, the Trial Court's Order is well supported by the facts and law and should be enforced.

i. The Abraham Covenant Was Not A Contingency

Notwithstanding the overwhelming record evidence supporting the Trial Court's Order, the Stadium Authority steadfastly insists, and the Court of Appeals ultimately

accepts, that the Abraham covenant was a mere contingency. Specifically, the Stadium Authority, at page 19 of its brief in response to Alibri's Application for Leave, states:

> The Option Agreement is clear: Alibri's price per square foot for the west side properties would be equal to the per square foot price paid by the Stadium Authority to the Abrahams...**This language clearly set up a contingency in the event that the Stadium Authority purchased the Abraham property. (Apx. 82a)**.

The giant leap advocated by the Stadium Authority (i.e. that the contract "**clearly set up a contingency**") is created out of thin air. Indeed, the Stadium Authority repeatedly states that "nowhere does the contract require the Stadium Authority to acquire the Abraham property" yet the Stadium Authority's argument, and the Court of Appeals Opinion, is premised on "a contingency" that is found nowhere in the contract (i.e. by inserting the word "if" in a contract provision that does not contain the word).

The Stadium Authority's zeal to justify and defend the Court of Appeals' improper redrafting of the underlying contract leads it down a path of its own undoing. Specifically, the Stadium Authority asserts that the condemnation provision of the contract illustrates the propriety of the Court of Appeals' decision. Specifically, the Stadium Authority states:

> Assuming *arguendo* that the trial court was correct in deciding that part of the consideration to the option agreement was the intent to purchase the Abraham property and the intent to condemn in the absence of an agreement, the trial court still should never have looked beyond the document. Alibri covered both of these issues with conditional clauses drafted by her attorney. The clauses are clear and plain: (1) **if** the Stadium Authority did not exercise the option, then it would not condemn Alibri's properties on the west side; and (2) **if** the Stadium Authority purchased the Abraham properties, then Alibri would receive the same price paid by the Stadium Authority to the Abrahams. **(Apx. 83a)**.

A closer look at the provisions highlighted by the Stadium Authority demonstrates not only the fallacy of the position, but the error committed by the Court of Appeals. A review of paragraph 5 of Attachment B to the Option (the condemnation provision) next to the Abraham covenant demonstrates this point clearly:

Condemnation Provision	Abraham Covenant
Optionee [Stadium Authority] agrees that **if** this Option for Purchase of Land is not exercised, Optionee shall not condemn this Property." **(Apx. 128a).**	It is further agreed between optionor and optionee that the per square foot price paid to optionor for the property located on the west side of Woodward shall be equal to the price per square foot paid by optionee (which includes the swapping of land or any other form of consideration) to the owners of the parcel located on Elizabeth and Park Avenue for the property located on Elizabeth and Park Avenue (identified as Ward 2, Item 413). **(Apx. 128a)**.

As the Court can see, the "condemnation" provision specifically includes the word "if" and, thus, establishes a contingency. Conversely, the Abraham covenant does not include the word "if". Thus, the contract contains a provision that sets forth a contingency and explicitly does so by incorporating the contingent word "if". That same contract, however, also addresses the purchase of the neighboring property and explicitly **does not** incorporate the word "if". Yet, the Court of Appeals ignored this difference, and the Trial Court's analysis and, instead, simply inserted the word "if" when the parties themselves did not.[14]

[14] Throughout its brief in response to Alibri's Application for Leave, the Stadium Authority repeatedly states that Alibri drafted the contract and, therefore, any ambiguity

This Court should ask itself why the parties did not include the contingent modifying language in the Abraham covenant when they did just two paragraphs below with respect to condemnation. If this Court, as the Trial Court did, applies basic rules of contract construction, the answer to that question is simple – because the covenant was not a contingency that could be satisfied or not at the will of the Stadium Authority. As the Trial Court's Order states, and as discussed at length in this brief, the contract language and the undisputed facts conclusively demonstrate that Alibri only agreed to sell the underlying property based on the covenant that the Stadium Authority could and would acquire the neighboring property and all west-side properties, and the threat of condemnation. Since the Stadium Authority did not, and could not, acquire the neighboring property, or condemn the underlying property, the Trial Court properly exercised its discretion and rescinded the contract.

The Court of Appeals' disregard of undisputed facts and redrafting of the contract is impermissible under Michigan law.[15] Indeed, the Michigan Court of Appeals in Soloman v Western Hills, 88 Mich App 254; 276 NW2d 577 (1979) rejected the very analysis applied by the Court of Appeals with respect to the Abraham covenant. Alibri

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must be construed against it. As with much of its brief, this statement is false. Attorneys for both parties participated in the drafting of the underlying contract and, therefore, the Stadium Authority is not entitled to the inference it desires. Homac, Inc v. DSA Financial Corp, 661 F Supp 776, 788 (ED Mich 1987) ("we note that the rule of contra proferentum is one of last resort... [and] the justification for applying such rule pales in a situation, like the instant one, where the terms of the agreement resulted from a series of negotiations between experienced drafters.)

[15] Under Michigan law, "[t]he cardinal rule in the interpretation of contract is to ascertain the intention of the parties." Teachout v Maiers, 2 Mich App 69, 73; 138 NW2d 560 (1965). Moreover, courts "cannot rewrite the clear agreement of the parties under the guise of interpretation." Patek v Aetna Life Ins Co, 362 Mich 292, 295; 106 NW2d 828 (1961). A court is forbidden from supplying material provisions that are absent from a clear and unambiguous writing. Purlo Corp v 3925 Woodward Ave, 341 Mich 483; 67 NW2d 684 (1954).

relied on Soloman in its brief to the Court of Appeals, however, the Court of Appeals inexplicably ignored the case and failed to distinguish it.

In Soloman, plaintiff's sale of a lot in a subdivision to defendant contained a provision that the purchase price would be paid when the subdivision plat was recorded. The defendant subsequently transferred the property in question to another developer who then recorded a plat for the subdivision. Defendants contended that they were not obligated to pay the purchase price because they did not record the subdivision plat. Id. at 255. In rejecting Defendant's position, the Court in Soloman stated:

> We disagree with Defendant's characterization of the clause "when plat is recorded". **The clause does not read "if plat is recorded"**. If it had been so drafted we would agree that the recording of the plat constituted a condition precedent to the duty of performance under the contract. However, as drafted the clause is susceptible to the interpretation that the plat will be recorded at some unknown time in the future.[16]

Id at 256.

As illustrated above, the Abraham covenant, unlike the condemnation covenant, does not contain the word "if" as the Court of Appeals held. Based on the agreement itself and undisputed circumstances leading to the insertion of this provision in the contract, the language of the Abraham covenant is not ambiguous, as the Trial Court found, and can only be understood as a promise that the Stadium Authority would and could acquire the Abraham property. Since this promise was indisputably illusory at the time it was made, the Trial Court properly rescinded the contract based on a mutual mistake of fact.

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[16] The decision in Soloman is also directly contrary to the Court of Appeals' unilateral interjection of waiver as a bar to Alibri's claim. This issue is discussed in detail below, however, Soloman demonstrates that a provision in a contract, like the Abraham covenant, is not waived simply because it was not fulfilled at the time of closing.

The Trial Court's Order was in full accord with the testimony of Jerry Rosenfeld on this issue. Mr. Rosenfeld not only testified that the Abraham covenant was placed in the contract to protect Alibri, but that the Stadium Authority explicitly represented that it was, in fact, going to buy the Abraham property. **(Apx. 93a; 96a).** Moreover, Mr. Rosenfeld testified that the Stadium Authority would condemn the Abrahams west-side property if it was not purchased through a negotiated sale. **(Apx. 102a).** The belief that the Stadium Authority was capable of acquiring the Abraham property, and all west-side properties, is further corroborated by Mr. Duggan's Affidavit, **(Apx. 114a).** The error of this belief was confirmed by Mr. Duggan's subsequent testimony. **(Apx. 135a).**[17]

Here, based on the discussion above, it is clear that there was no ambiguity. The covenant does not say "if" the Stadium Authority purchased the Abraham property. The Stadium Authority represented that it would and could acquire the Abraham property and all west-side properties and Alibri relied on this representation; however, the Stadium Authority never had the ability to fulfill this promise. It was illusory and properly served as the basis for rescission.

The Court of Appeals' Opinion is directly contrary to basic contract interpretation principles in Michigan, the decision in Soloman supra, and the law in this State regarding rescission of contract. Rosenthal, supra. Moreover, like in Rosenthal, supra, there is no genuine issue of fact that Alibri would never have executed the underlying contract had a default in the Abraham covenant been expected or contemplated. As the

[17] Again, since the Stadium Authority argued that the contract was ambiguous, **(Apx. 56a-57a)**, the consideration of extrinsic evidence (such as the testimony of Jerry Rosenfeld and Mike Duggan and the affidavit of James Alibri) is wholly appropriate in order to determine whether an ambiguity exists. Goodwin, Inc v Orson E Coe Pontiac, Inc, supra.

Trial Court found, the word "if" is simply not present in the Abraham covenant. As such, this Court should affirm the Trial Court's Order consistent with the decision in Workers' Comp Bureau v Durant, 195 Mich App 626, 629; 491 NW2d 584 (1992) which held ". . . there are no words . . . in the contract that would conflict with the Trial court's interpretation." The Court of Appeals fundamentally erred by reversing the Trial Court, and directing entry of Summary Disposition in favor of the Stadium Authority and should be reversed.

C. Innocent Misrepresentation

The Trial Court correctly held that even if the Stadium Authority innocently misrepresented its ability to follow through on its threat of condemnation to Alibri and/or its ability to acquire the Abraham property, that rescission of the contract for the sale of the underlying property was still appropriate. The Trial Court's decision in this regard is in accord with Michigan law. The Michigan Court of Appeals in Britton v Parkin, 176 Mich App 395; 438 NW2d 919 (1989) noted the propriety of such relief and stated:

> We believe that the better rule is one providing that **rescission is justified in cases of innocent misrepresentation** if a party innocently relies upon the misstatement. The theory underlying this rule is that the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation, even though innocently made . . . Under these circumstances, the trial court's decision to grant rescission and return to the status quo ante was equitable.

Id. at 398-399.

In Britton, plaintiffs purchased property from defendants who had advertised it as "commercial property for sale." When plaintiffs attempted to resell the property it was determined that the property was not zoned commercial, but rather was zoned

residential-agricultural. Id. at 396-397. Plaintiff brought suit on theories of fraud and misrepresentation, and the trial court granted plaintiff's request for rescission.

This Court in United States Fidelity & Guaranty Co v Black, 412 Mich 99; 313 NW2d 77 (1981) set forth the elements necessary to prove a claim of innocent misrepresentation. Specifically, this Court stated:

> The innocent misrepresentation rule represents a species of fraudulent misrepresentation **but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant** that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintended false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. **Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false.** Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract.

Id. at 117-119.

It is also undisputed that Alibri had no intention of selling the underlying property prior to the Stadium Authority's threat of condemnation. In fact, it is undisputed that the only reason Alibri even entertained the sale of the underlying property was based on the Stadium Authority's explicit representation that it would condemn the property if a negotiated sale could not be reached. It is undisputed that Alibri was further induced into selling the west-side property based on the representation that the Stadium Authority would and could acquire the Abraham property and all other west-side property. **(Apx. 120a-123a; 134a)**. It is further undisputed that Alibri relied on this misrepresentation. **(Apx. 122a).** Finally, it is undisputed that the Stadium Authority had no ability to condemn the west-side property, or any properties in the west-side Project

Area, including the Abrahams. **(Apx. 5a; 135a)**. As a result, the Stadium Authority misrepresented its powers which served as the underlying inducement for the sale and undisputed understanding of the parties. It is further undisputed that as a result of its misrepresentations, the Stadium Authority obtained Alibri's west-side property. The contract, therefore, was properly rescinded by the Trial Court.

In reversing the Trial Court, the Court of Appeals made the following erroneous statements:

1. "In this case, no evidence existed that defendant misrepresented **its intent** to **purchase** or condemn the west-side property for the stadium project." **(Apx. 79a).**
2. That there was no false statement. **(Apx. 79a).**
3. ". . . the record does not support the conclusion that plaintiff relied on defendant's ability to immediately institute condemnation proceedings." **(Apx. 79a).**
4. "A claim of innocent misrepresentation cannot be supported on a promise of future performance." **(Apx. 79a).**

Each of these misstatements warrants a closer review.

i. It is Undisputed that the Stadium Authority Misrepresented Its Ability to Condemn the West-Side

The first reason relied on by the Court of Appeals is a misstatement of the reasoning underlying the Trial Court's Order. The Trial Court did not rescind the contract based on the Stadium Authority's intent to acquire west-side properties. Rather, the Trial Court rescinded the contract based on the Stadium Authority's inability to condemn the west-side contrary to its representations at the time of contracting. **(Apx. 64a-65a; 114a)**.

ii. It is Undisputed that there was a False Statement

The second reason relied on by the Court of Appeals is a further misstatement of the record. The Stadium Authority threatened to immediately condemn the west-side property and all properties in the west-side Project Area at the time of contracting and it is undisputed that it could not. **(Apx. 103a; 114a; 135a)**. Thus, there was a false statement.

iii. Reliance is Undisputed

The third reason relied on by the Court of Appeals is also flatly contradicted by the record. The affidavit of James Alibri, which is unrefuted, explicitly states that Alibri relied on this false statement in entering the contract. **(Apx. 122a)**. Thus, the record only supports the conclusion that Alibri relied on the Stadium Authority's ability to immediately institute condemnation proceedings.

iv. The Trial Court did not Base its Finding on a Promise of Future Performance

The Court of Appeals' statement that an innocent misrepresentation cannot be based on a promise of future performance is as true as it is irrelevant. The Trial Court held that the Stadium Authority innocently misrepresented its ability to condemn the west-side property, as well as the Abraham property, at the time it threatened Alibri with condemnation if a sale was not executed. **(Apx. 64a-65a)**. As discussed above, this was a misrepresentation with respect to a fact existing at the time of contracting, and did not relate to a future event.

For the reasons set forth above, it is undisputed that representations were made, that the representations were false, that Alibri relied on those representations and that the representations related facts existing at the time. As such, the Trial Court's decision

to rescind the October 31, 1996 contract based on innocent misrepresentation is in accord with the undisputed facts and Michigan law. Conversely, the Court of Appeals has misstated Michigan law and the record and should be reversed.

3. The Stadium Authority's Inability To Condemn, As Threatened, At The Time of Contracting Constitutes a Failure of Consideration Supporting The Trial Court's Rescission of Contract.[18]

The Court of Appeals acknowledged that the Abraham covenant was bargained-for consideration, **(Apx. 77a)**; however, it reversed the Trial Court's finding that this consideration failed. The Court of Appeals' holding in this regard ignores the undisputed facts and Michigan law.

The Stadium Authority explicitly stated that it was purchasing the underlying property under threat of condemnation. **(Apx. 117a)**. Indeed, Alibri's property was not for sale, and the Stadium Authority's threat and representations regarding acquisition of the entire west-side project area were the only reasons she even entertained the idea. **(Apx. 120a-123a)**. Mr. Duggan submitted an affidavit representing, consistent with the representations at the time the underlying contract was executed, that the Stadium Authority could have instituted condemnation proceedings at the time of contracting. **(Apx. 114a)**. As demonstrated above, this representation was false. **(Apx. 5a; 135a).** As such, the consideration presented to Alibri (i.e. that the underlying property would and could be condemned if a negotiated sale could not be reached and that the Abraham property would and could be condemned) failed because the Stadium Authority, in fact, had no ability to condemn any west-side properties as represented.

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[18] Alibri incorporates the Standard of Review set forth in Argument 2.

The Court of Appeals proceeded to erroneously suggest that the Trial Court ruled on the adequacy of consideration which, as a general rule, should not be explored by the courts. **(Apx. 78a).** Nowhere in the Trial Court's July 11, 2000 Order or in Alibri's pleadings is the adequacy of consideration addressed. The Trial Court's decision has nothing to do with the adequacy of consideration, and the Court of Appeals' reliance on this issue is erroneous and should be reversed.[19]

The Trial Court's Order to rescind the contract for the west-side property based on the Stadium Authority's failure, and inability, to fulfill its obligations under the Abraham covenant, is consistent with this Court's holding in Gerycz v Zagalski, 230 Mich 381; 203 NW 65 (1925) and the Court of Appeals holding in Barbart v M E Arden Company, 74 Mich App 540; 254 NW2d 779 (1977).

In Gerycz, this Court set aside a deed transferred by plaintiff to defendant because of a failure of consideration. The basis for the Court's conclusion was premised on the fact that plaintiff agreed to transfer the deed to his property in exchange for defendant's assignment of its vendee interest in a land contract covering another property. Defendant, however, was in default under the land contract at the time of contracting with plaintiff. Gerycz, 230 Mich at 381-382. As a result, this Court stated:

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[19] The Court of Appeals noted that, "Mere inadequacy of consideration, unless it be so gross as to shock the conscience of the Court, is not ground for rescission." **(Apx. 78a).** If the Court of Appeals is correct in its finding that the Trial Court based its decision on the adequacy of consideration, which it did not, the Court committed clear err in finding that the Stadium Authority's procurement of the underlying property, under the circumstances in this case, for $6.85 a square foot when it is now known that the value was $50.00 a square foot, was adequate consideration and did not "shock the conscience of the Court."

> Plaintiffs traded their home for a farm, not for a prospective lawsuit with Holeva over a defaulted contract...we think there was such a failure of consideration as justified a court of equity in granting plaintiffs relief.

Id. at 384.

Likewise, Alibri "traded" her property to the Stadium Authority based on the Stadium Authority's promise to acquire the Abraham property, and all west-side properties, which was allegedly necessary for the project and would result in Alibri's receipt of fair market value for her property without forcing the Stadium Authority to file a condemnation action. The Stadium Authority, however, never had the ability to fulfill this consideration like the defendant in Gerycz.

The Stadium Authority's illusory promise to pay Alibri what it paid Abraham, because it did not have the ability to acquire the Abraham property, is a sufficient failure of consideration to rescind the contract. Barbart, supra. In Barbart, the Court of Appeals rescinded a broker agreement that contained an irrevocability clause based on failure of consideration due to the unenforceability of the promise underlying the contract. Barbart, 74 Mich App at 544. Likewise, the Stadium Authority's promise was unenforceable as it had no ability to fulfill it and, therefore, the Trial Court properly found there was a failure of consideration.

The decisions in Gerycz and Barbart, like all of the rescission of contract cases supporting reversal of the Court of Appeals, are premised on the underlying reasoning set forth in Rosenthal, supra. That is, that rescission is proper where "the contract would not have been made if default in that particular had been expected or contemplated." Rosenthal, 261 Mich at 463. The record evidence is unrefuted that Alibri would not have agreed to convey the underlying property had the Stadium

Authority's default on the Abraham covenant, promise to acquire the entire west-side Project Area, or promise not to convey her property to the Detroit Tigers been expected or contemplated. As such, the Court of Appeals' decision should be reversed.

4. By Ignoring the Undisputed Facts and the Equitable Considerations Properly Applied by the Trial Court in Rescinding the Contract, the Court of Appeals Has Set a Dangerous Precedent

A. Standard of Review

The rescission of a contract is an equitable remedy within the sound discretion of the Trial Court. Dingeman v Reffitt, 152 Mich App 350, 355; 393 NW2d 632 (1986). Equitable actions are reviewed de novo, but the factual findings of the Trial Court are reviewed for clear error. MCR 2.613(C); Lenawee Co Bd of Health v Messerly, 417 Mich 17; 331 NW2d 203 (1982). The factual findings of a trial court are given considerable weight by a reviewing court. Attorney General v Michigan Public Service Comm, 249 Mich App 424, 434; 642 NW2d 691 (2002). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. Meek v Dep't of Transportation, 240 Mich App 105, 115; 610 NW2d 250 (2000).

B. The Trial Court Properly Found the Equities of the Case Supported Rescission of Contract.

The Trial Court's decision to rescind the contract for the sale of the underlying property was supported by the equities of the case which were premised on undisputed factual findings. The Court of Appeals' reversal, however, failed to explain why the Trial Court's factual findings were clearly erroneous. Instead, the Court of Appeals ignored the undisputed facts and summarily substituted its own belief that the Stadium

Authority's acquisition of the underlying property by way of a threat of condemnation (when it had no such ability) promise to pay Alibri what it paid Abraham (when it had no ability to acquire the Abraham property), representation that it was not going to transfer the property to the Detroit Tigers then borrowing money from the Detroit Tigers to acquire the property and "subsequently" agreeing to pay back the "loan" with the property (contrary to its representations), and the rescission of its Declaration of Necessity was appropriate because the Detroit Tigers were "both a major beneficiary and benefactor of the project."[20] **(Apx. 79a-80a)**.

The Court of Appeals' published Opinion is a radical departure from and in conflict with the limitations placed on a condemning authority's power. It amounts to nothing more than the Court of Appeals' subjective opinion that the Detroit Tigers should be rewarded for their construction of a new stadium. In reaching this erroneous result, the Court of Appeals has provided a judicially endorsed blueprint for all condemning authorities to follow in order to avoid the "troubles" of operating within the

[20] The Court of Appeals' improper assessment of the perceived benefit bestowed on the City by the Detroit Tigers is exactly what Justice Ryan in Poletown Neighborhood Council v Detroit, 410 Mich 616, 646; 304 NW2d 455 (1981), warned of in his dissent when he stated, ". . . it seems important to describe in detail for the bench and bar who may address a comparable issue on a similarly stormy day, how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means." Justice Ryan further emphasized this point, and thus the impropriety of the Court of Appeals' decision in this case, by stating, "[i]t will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation as its private property, uncontrolled by law as to its use." Poletown Neighborhood Council, 410 Mich at 678.

limits of their constitutional and statutory powers of eminent domain by encouraging them to do indirectly what they are prohibited from doing directly.[21]

The prevailing theme of the Court of Appeals' Opinion is that since the Stadium Authority never "condemned" or filed a Complaint against Alibri, its conduct was without limitation. Again, Alibri has never contended that this is a physical "takings" case, however, the pre-condemnation conduct of the Stadium Authority is expressly controlled and limited by the UCPA. MCL 213.55(1); In re Condemnation of Land, 211 Mich App 688, 693; 536 NW2d 598 (1995) (The UCPA provides standards for an **agency's acquisition of land**, the conducting of condemnation actions, and the determination of just compensation); Oakland Hills v Lueders Drain, 212 Mich App 284, 290; 537 NW2d 258 (1995) ("We note, however, that § 5 of the UCPA . . . extends beyond providing procedures for condemnation and **establishes requirements for the precondemnation negotiation process**.").

Moreover, the Court of Appeals has approved of the Stadium Authority's sale of Alibri's property to the Detroit Tigers despite the fact that the Stadium Authority does not possess the power to sell property under MCL 123.951, et seq.[22] In this regard, the Court of Appeals has clearly expanded the Stadium Authority's powers beyond that given by the Legislature. Thus, the Court of Appeals' desire to achieve a result has not

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[21] In his dissent in Poletown Neighborhood Council, Justice Ryan articulated a hope that ". . . the precedential value of this case will be lost in the accumulating rubble." Poletown Neighborhood Council, 410 Mich at 684. Regrettably, it has not and the decision of the Court of Appeals in this case will serve as a further expansion of a condemning authority's powers beyond constitutional limits – unless it is reversed by this Court.

[22] This leaves aside the questions of whether the Stadium Authority breached its fiduciary obligations by agreeing to "sell" publicly owned property for 10 times below market value.

only led it to inaccurately restate the Trial Court's analysis, but has the presumably unintended consequence of expanding the Stadium Authority's power beyond that provided by statute.

The limits placed on a condemning agency before it exercises its powers of eminent domain can best be explained by recognizing the extremity of the power and the proper limitations placed on the government. Indeed, the Michigan Court of Appeals recognized:

> The party whose property is being taken by eminent domain is entitled to the **utmost protection** of the Courts since the exercise of such power is drastic . . .

Lansing v Jury Rowe, 59 Mich App 316, 319; 229 NW2d 432 (1975).

Moreover, the United States Supreme Court in Dolan v City of Tigard, 512 US 374, 392; 114 S Ct 2309, 2320 (1994) recognized the importance of limiting the government's use of its eminent domain powers. In Dolan, Chief Justice Rehnquist stated:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in comparable circumstances.

Thus, this Court, as the Trial Court did, and as the Court of Appeals did not, should carefully consider the propriety of the Stadium Authority's threat to immediately condemn Alibri's property during the negotiations for its purchase when, in fact, it had no such power. Since the power of eminent domain is such a drastic power, the limitations should be construed in favor of the displaced landowner. Muskegon v Irwin, 31 Mich App 263, 268; 187 NW2d 481 (1971).

The notion, as the Court of Appeals suggests throughout its Opinion, that the threat of condemnation is "immaterial" and that the UCPA is not implicated because these threats resulted in a sale and not a physical taking is to so minimize the limitations placed on the powers of a condemning authority that they no longer exist. Moreover, the premise of the Court of Appeals, and the Stadium Authority, that the UCPA is not implicated because a physical "taking" did not occur was expressly rejected by the Court of Appeals in Oakland Hills, supra. Oakland Hills, 212 Mich App at 291 ("Defendants [condemning authority] assert that because their dealings with plaintiff involved a voluntary rather than involuntary transfer of property, the UCPA was not applicable. We disagree. This assertion contradicts the language of the UCPA").

The Court of Appeals' Opinion sanctioning the indirect accomplishment of what the Stadium Authority is prohibited from directly accomplishing is in further conflict with the law in Michigan and specifically this Court's holding in People v Pommerening, 250 Mich 391; 230 NW 194 (1930). In Pommerening, this Court explicitly stated that a condemning agency does not have the power to condemn land for the use and benefit of a private corporation, whose funds, and not the condemning agency's, will pay for the purchase of the property condemned. Id. 395-396. In reaching this conclusion, this Court held:

> A state agency, vested with the power of eminent domain, may not employ the power, **directly or indirectly**, for the use and benefit of another, unless so authorized by law.

Id at 396.

The Stadium Authority's threat of condemnation, acquisition of property as a result of that threat, borrowing money from the Detroit Tigers to purchase the property

and "subsequent" agreement to pay back the "loan" with the property is an indirect use of the eminent domain power which would be explicitly prohibited if employed directly. It must again be emphasized that it is undisputed that the Stadium Authority repeatedly misrepresented to Alibri that it was not going to transfer the underlying property to another private entity such as the Detroit Tigers. After all, if the property was not needed by the Stadium Authority for a public project, as in this case, then Alibri should have been permitted to maintain its parking lot operations.

The basic principle of eminent domain law, which precludes taking property that is not necessary, has been repeated on numerous occasions. Indeed, the Court of Appeals in City of Troy v Barnard, 183 Mich App 565, 568-569; 455 NW2d 378 (1990), found that while a condemning authority's project was necessary, it nevertheless "abused its discretion with respect to the acquisition of lands for the construction of the [project] by having no plans or specifications for the project drawn up beforehand."[23]

Similarly, it is a fundamental principle of Michigan law that it is inappropriate for a condemning authority to use its power of eminent domain to take property from one private party and to give it to another private party. Tolksdorf v Griffith, 464 Mich 1, 8; 626 NW2d 163 (2001); Shizas v Detroit, 333 Mich 44, 50; 52 NW2d 589 (1952); City of Centerline v Chmelko, 164 Mich App 251; 416 NW2d 401 (1987).

While no physical "taking" occurred in this case, it cannot be disputed that the Stadium Authority acquired the underlying property as a direct result of its threat to exercise its eminent domain powers. By its own admission, the Stadium Authority's threat to condemn was illusory. The simple fact is that the Stadium Authority did not

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[23] Here, the Stadium Authority had no plan for the use of the underlying property at the time it threatened to condemn it.

have the ability to condemn the underlying property as threatened or to acquire the Abraham property as represented. Moreover, despite the undisputed fact that it does not need the underlying property, **(Apx. 165a)**, the Stadium Authority has vigorously defended this action so that it can complete its improper transfer of the property to the Detroit Tigers,[24] contrary to its representations at the time of contracting. Thus, the Stadium Authority has employed the powers of eminent domain to take property from one private party and is attempting to give it to another private party. The fact that they did not physically "take" the property, as that term of art is used, is immaterial. The Court of Appeals has essentially held that it is constitutional and legal for a condemning authority to successfully bluff a property owner into selling property. This should not be the law in this State.[25]

The Trial Court applied the undisputed fact that the Stadium Authority could not do what they threatened to do (condemn) and promised to do (acquire Abraham), both of which related to a fact at the time of contracting, and its promise to not do what it is attempting to do (transfer the property to the Detroit Tigers) to the legal theories advanced by Alibri (i.e. rescission based on mutual mistake, innocent misrepresentation and failure of consideration), and properly found that the equities fell in favor of rescinding the contract for the sale of the west-side properties. Moreover, the

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[24] As stated above, it is actually the Detroit Tigers who are pursuing this action in accord with the indemnification agreement with the Stadium Authority. **(Apx. 159a).**

[25] Again, the precedential impact of the Court of Appeals' decision in this case cannot be emphasized enough. The Court of Appeals has provided condemning authorities with a blueprint to circumvent the well established limitations placed on the government's power of eminent domain. This Court should reverse because, as Justice Ryan in his dissent in Poletown Neighborhood Council warned, ". . . the unintended jurisprudential mischief which has been done, if not soon rectified, will have echoing effects far beyond this case." Poletown Neighborhood Council, 410 Mich at 660.

underlying property was the only property acquired by the Stadium Authority in the west-side Project Area. Every other property owner either maintains ownership or has sold it in a voluntary arms length transaction. The Court of Appeals, however, failed to articulate why the Trial Court's findings are clearly erroneous. The Court of Appeals failed in this regard because the findings are equitable and premised on undisputed facts.

What the Trial Court realized, and the Court of Appeals ignored, is that it was inequitable for the Stadium Authority to confer the favor it intended to the Detroit Tigers at the expense of the private property owner under the circumstances in this case. The Trial Court's findings were just and equitable and based on undisputed facts. The Court of Appeals' reversal was not, and should be reversed.

5. The Court of Appeals Committed Reversible Error by Relying on a Legal Theory that is Contrary to the Position Taken by Both Parties, is Inapplicable to the Present Case, and was Neither Raised on Appeal Nor Addressed in the Trial Court's Order.

A. Standard of Review

A trial court speaks through its orders, and the Court of Appeals jurisdiction is limited to a review of the questions presented to and decided by the trial judge. Garavaglia v Centra Inc, 211 Mich App 625, 628; 536 NW2d 805 (1995); Stockler v Rose, supra.; Napier v Jacobs, supra.. A contract must be construed in its entirety to determine the intent of the parties. Perry v Sied, 461 Mich 680, 689 n10; 611 NW2d 516 (2000). The Court of Appeals committed reversible error by interjecting and relying on a legal theory that is: (1) directly contrary to both Alibri's and the Stadium Authority's

understanding of the contract, (2) was not raised on appeal; and (3) was not addressed by the Trial Court's July 11, 2000 Order.

B. The Court of Appeals' Holding that Alibri Waived or Discharged Her Claims Arising From The Abraham Covenant is Clearly Erroneous

In order to reverse the Trial Court's Order to rescind based on the Abraham covenant, the Court of Appeals not only misstated the basis of the Trial Court's Order and inserted words into the agreement (as discussed above), but it repeatedly stated that Alibri waived any claims arising out of the covenant when she closed on the sale in January 1997. **(Apx. 76a; 78a-79a).** The Court of Appeals committed reversible error in this regard for a number of reasons.

i. The "Waiver" Theory is Directly Contrary to the Stadium Authority's Admissions

The Court of Appeals' assessment that the Stadium Authority's failure to fulfill the Abraham covenant prior to closing operated as a waiver to any future claim is directly contrary to the position taken by the Stadium Authority itself. Specifically, Mike Duggan submitted an affidavit on February 16, 1999 (two years after the closing) stating, directly contrary to the Court of Appeals' Opinion, that:

> To date, the Stadium Authority has not yet purchased the Abraham's . . . properties **but it continues to acknowledge its prior agreement with Alibri that if the Stadium Authority purchases the Abraham property, Alibri will be compensated if the price of the Abraham property** is greater per square foot than that paid to Alibri for the subject properties. **(Apx. 116a).**

While this promise is an empty one, since the Stadium Authority never had the ability to acquire the Abraham property, it does demonstrate that the covenant was not cut off, waived or satisfied at the time of closing in 1997. The Court of Appeals has

adopted a position that is directly contrary to the parties' undisputed understanding of the contract. Since it is the obligation of the Court to ascertain the intent of the parties to a contract, the Court of Appeals' decision to adopt a position directly contrary to both parties' understanding is clearly erroneous and should be reversed.

ii. The Authority Relied on by the Court of Appeals is Inapplicable

The Court of Appeals' reliance on 17A Am Jur 2d, Contracts, §§ 658-659, pp 665-666, is misplaced. Aside from the tenuous proposition that Am Jur 2d is binding authority on the Courts in Michigan, Sections 658 and 659 relate to conditions precedent and the waiver of such by performance. A condition precedent is a fact or event that the parties intend must occur before there is a right to performance. Knox v Knox, 337 Mich 109, 118; 59 NW2d 108 (1953); Yeo v State Farm Ins Co, 219 Mich App 254, 257; 555 NW2d 893 (1996).

Here, the parties clearly did not intend for the Abraham covenant to be a condition precedent that must occur before the Stadium Authority had a right to exercise the option in January 1997. **(Apx. 116a).** In addition, the contract does not state that if the Stadium Authority fails to purchase the Abraham property during the option period then Alibri may terminate and otherwise refuse to sell the underlying property. Such language does not exist, yet this is the exact condition precedent that the Court of Appeals has unilaterally found to exist. Clearly this provision was intended by the parties to survive the closing since the purchase/condemnation of the entire west-side, including the Abraham property, would likely take years.

iii. The "Waiver" Theory Was Not Raised on Appeal or Addressed by the Trial Court's July 11, 2000 Order

The issue of waiver and satisfaction was not raised by the Stadium Authority or briefed by the parties on appeal. **(Apx. 70a)**. In fact, this issue was not raised or considered by the Trial Court in connection with the July 11, 2000 Order. **(Apx. 58a-68a).** Again, it is well settled that the Court of Appeals does not review issues not addressed by the Trial Court. Garavaglia v Centra, Inc, 211 Mich App 625, 628; 536 NW2d 805 (1995). [26]

Yet, this is exactly what the Court of Appeals did and, therefore, exceeded the scope of its review.

Not only is the Court of Appeals' activist interpretation of the contract erroneous on its face, but it runs afoul of the Court's well established principle not to construe promises in a contract as conditions precedent, "unless compelled to do so by language of the contract plainly expressed." Knox, 337 Mich App at 118. Not only does the Court of Appeals' curious holding find no support in the contract, but it is directly contrary to the affidavit of Mike Duggan. **(Apx. 116a).** The admission by Mr. Duggan conclusively demonstrates that the deed did not constitute full performance of the purchase agreement and, therefore, is an exception to doctrine of satisfaction and discharge.

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[26] See also, Stockler v Rose, 174 Mich App 14, 54; 436 NW2d 70 (1989) (a court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders...accordingly, the court limits its review to the questions presented to and decided by the trial judge); Napier v Jacobs, 429 Mich 222, 2334-235; 414 NW2d 862 (1987) (The Court of Appeals is a Court of limited authority. There was no order or ruling upon which to base appellate review of the unpreserved issue.)

The more appropriate analysis applicable to this case, and wholly ignored by the Court of Appeals, was aptly stated by this Court in Mehling v Evening News Association, 374 Mich 349; 132 NW2d 25 (1965). In Mehling, this Court stated:

> Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act . . . .

Id. at 352.[27]

Here, the underlying contract was executed based on the understanding of the parties that the Stadium Authority had the ability to acquire the Abraham property, and that Alibri would receive the same amount per square foot as Abraham received when the Stadium Authority acquired it. Mr. Duggan's affidavit confirms that the parties understood that the acquisition of the Abraham property would occur subsequent to the execution of the contract and was not waived at the time of closing. **(Apx. 116a).** As discussed throughout, however, not only did the Stadium Authority fail to pursue the acquisition of the Abraham property, but it never had the ability to acquire it. As such, the "future event" (e.g. payment to Alibri what was paid to Abraham) was "dependent in whole" on the Stadium Authority, and the Stadium Authority unquestionably placed an "obstacle in the way of the happening of such event" by never having the ability to fulfill the "event" as it represented it was capable of achieving at the time of contracting. Moreover, its subsequent rescission of the Declaration of Necessity ensured that the "event" could never happen.

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[27] See also, Hayes v Beyer, 284 Mich 60, 64-66; 278 NW 764 (1938).

Based on the above, it cannot be seriously disputed that the execution of the deed by Alibri did not constitute full performance of the underlying Option Agreement. As such, this case represents the exception to the general rule that the execution of a deed operates as satisfaction and discharge of the terms of an executory contract. Goodspeed v Nichols, 231 Mich 308, 316; 204 NW 122 (1925). See also, Kahn-Reiss, Inc v Detroit & Northern Savings & Loan Ass'n, 59 Mich App 1; 228 NW2d 816 (1975); Chapdelaine v Sohocki, 247 Mich App 167; 635 NW2d 339 (2001).

In sum, the Court of Appeals' haste to achieve the reversal it desired led it to ignore the parties' mutual understanding of the Abraham covenant and interjected a legal theory that was neither raised nor considered by the Trial Court or in the appellate briefs. Moreover, the authority relied on by the Court of Appeals is inapplicable to the present case. Such conduct should not be left undisturbed, and should result in reversal.

CONCLUSION/RELIEF REQUESTED

Unless this Court reverses the Court of Appeals, the notion of what conduct is permissible by a condemning authority and basic principles of contract law will be turned on its head. The Court of Appeals' published Opinion will encourage condemning authorities to pass bogus Declarations of Necessity, threaten to condemn an area when it cannot, lure a private property owner to transfer property for significantly less than fair market value with the promise to pay fair market value when the other properties in the area are taken (when those properties cannot be acquired and are never acquired), rescind the bogus Declaration of Necessity and then transfer the property to a preferred private developer. None of these actions would be

permissible if a physical taking occurred. The fact that these actions arose by way of a threat of condemnation does not wash them free of impropriety. Rather, like the present case, it simply changes the focus from a necessity challenge to a rescission of contract analysis and proper application of the equities in the case.

Alibri just wants her property back so her family can operate a parking lot on it as they did for years before the idea of a stadium in the area was ever considered. The Stadium Authority should have given it back to her, but it has refused.

The Court of Appeals was forced to misstate the basis for the Trial Court's Order so that it could achieve the result it desired. Not only is such action inappropriate on its face, but the published Opinion has set a dangerous precedent for this State unless reversed. For the reasons discussed above, Alibri respectfully requests that this Court reverse the Court of Appeals.

Respectfully submitted,

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